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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CELOTEX CORPORATION,

Petitioner,

v.

MYRTLE NELL CATRETT,
ADMINISTRATRIX OF THE ESTATE OF
LOUIS H. CATRETT, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party may oppose a motion for summary judgment with inadmissible evidence where there is no indication that the evidence can be made admissible.

2. Whether the District of Columbia Circuit's decision, on remand from this Court, will undermine the utility of this Court's Opinions in Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986) and Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986).

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit (No. 83-1694) were Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, Deceased, and The Celotex Corporation, a wholly-owned subsidiary of Jim Walter Corporation, which is traded on the New York Stock Exchange.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Celotex Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia

Circuit is Catrett v.Johns-Manville Sales Corp., et al, No. 83-1694 (D.C. Cir. Aug. 7, 1987) and appears as Appendix A to this Petition.

The District Court's ruling granting summary judgment to Petitioner was issued from the bench during oral argument and is unreported. The transcript is attached hereto as Appendix B. A copy of the District Court's Order is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on August 7, 1987. On September 30, 1987, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing En Banc filed by Petitioner. Copies are attached hereto as Appendix D and Appendix E. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure. Rule 56 is set forth in Appendix F.

STATEMENT OF THE CASE

On September 2, 1980, Myrtle Nell Catrett, widow of Louis H. Catrett and Administratrix of his estate, filed a wrongful death and survival action in the United States District Court for the District of Columbia against fifteen corporate Defendants. The complaint was based on negligence, breach of warranty, and strict liability.

Mrs. Catrett alleged that as a result of Louis Catrett's exposure, during his career as an asbestos insulator, to asbestos products manufactured or distributed by the Defendants, Louis Catrett contracted malignant peritoneal mesothelioma and died on September 3, 1979.

On September 28, 1981, The Celotex Corporation (Celotex) filed a Motion for Summary Judgment, including a Statement of Material Facts and a Memorandum of Points and Authorities. Celotex withdrew its Motion for Summary Judgment on November 9, 1981, and subsequently refiled its Motion for Summary Judgment, including a Statement of Material Facts and a Memorandum of Points and Authorities, on December 23, 1981. The basis for Celotex's motion was that Mrs. Catrett had failed to produce evidence that any Celotex product was the proximate cause of Louis Catrett's death and that Mrs. Catrett could not show that Mr. Catrett had been exposed to Celotex's products within the jurisdictional limits of the district court. Celotex pointed to Mrs. Catrett's failure to identify Celotex's products in her answers to the joint interrogatories from all defendants

to plaintiff, and to Mrs. Catrett's failure to respond to Celotex's supplemental interrogatories, as the basis for its contention that plaintiff could not prove that Mr. Catrett had been exposed to Celotex's products.

Mrs. Catrett responded on January 4, 1982 by filing a Motion and Memorandum in opposition to Celotex's Motion for Summary Judgment. In her response, Mrs. Catrett produced, for the first time, three documents which she contended could be used to establish Mr. Catrett's exposure to Celotex's products. The documents were (1) a letter to Mr. Catrett's attorney from a claim representative at Aetna Casualty and Surety Company, (2) a letter from Mr. T. R. Hoff, Assistant Secretary of Mr. Catrett's employer, to a claim representative at Aetna Casualty and Surety Company, and (3) deposition testimony of Mr. Catrett, taken

during his workmen's compensation proceeding. Mrs. Catrett contended that these documents were exceptions to the hearsay rule and could be used to prove that Mr. Catrett had been exposed to Celotex's products.

On July 21, 1982, the district court, ruling from the bench, granted Celotex's Motion for Summary Judgment holding that there was no showing that Mr. Catrett had been exposed to Celotex's products in the District of Columbia or elsewhere. Appendix B at 43A.

On June 16, 1983, Mrs. Catrett filed a Notice of Appeal with the United States District Court for the District of Columbia, appealing the Orders granting summary judgment in favor of Celotex and Armstrong World Industries, Inc. and granting Turner & Newall, Ltd.'s Motion to Dismiss for Lack of Personal Jurisdiction.

Mrs. Catrett did not challenge the dismissal of the other twelve Defendants, and settled with Armstrong World Industries, Inc. and Turner & Newall, Ltd. prior to the oral argument on appeal.

On appeal, the District of Columbia Circuit reversed, holding that Celotex's "moving papers were patently defective on their face, rendering inappropriate the grant of summary judgment on the record as it stood before the District Court." Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir. 1985), rev'd 106 S. Ct. 2548 (1986). Thus the Court of Appeals did not reach the evidentiary issue.

The Court determined that Celotex merely pointed to Mrs. Catrett's inability to produce evidence to support her claim, and that Celotex offered no affidavits. Thus, the Court held that Mrs. Catrett need not come forward with evidence to oppose

Celotex's motion.

This Court granted certiorari and on June 25, 1986 reversed the decision and remanded the case back to the Court of Appeals. Celotex Corporation v. Catrett, 106 S. Ct. 2548 (1986). The purpose of the remand was for a determination by the Court of Appeals as to the adequacy of the showing made by Mrs. Catrett in opposition to Celotex's motion for summary judgment, and to address the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry Mrs. Catrett's burden of proof at trial.

This Court concluded that the Court of Appeals with its superior knowledge of local law was better suited to make these determinations in the first instance. 106 S.Ct. at 2555.

THE DECISION BELOW

On remand, the District of Columbia

Circuit, with Judge Bork dissenting, concluded that a genuine issue of material fact existed with respect to Appellant's exposure to Celotex products and therefore reversed the judgment and remanded the case for further proceedings. Catrett v. Johns-Manville Sales Corporation, et al, No. 83-1694, slip op. (D.C. Cir. Aug. 7, 1987) App. 17A. The majority's analysis focused upon four items which, taken cumulatively, the majority believed would be sufficient to defeat a summary judgment motion.

The first item considered by the majority was a letter from Mr. Hoff, an assistant secretary with Anning-Johnson Company, one of Mr. Catrett's employers. The letter purportedly reflects Mr. Hoff's knowledge that Mr. Catrett was exposed to Firebar fireproofing while employed by Anning-Johnson Company and that Firebar was manufactured by a company which was owned

by Celotex.

Despite Celotex's assertions to the contrary, the majority found that the inadmissibility of the letter was by no means obvious. The Court apparently considered the Hoff letter because it found that the letter was admissible as a business records exception to the hearsay rule as argued by Mrs. Catrett in her brief, and because it believed that Celotex had not objected to the District Court's consideration of the letter.

The second item considered by the majority was Mrs. Catrett's supplemental interrogatory answers, in which she named Mr. Hoff as a witness. According to the majority, this response, read with the Hoff letter, reflects the existence of a witness who can testify to Mr. Catrett's exposure to Firebar.

The third item was certain documents

produced by Celotex which recorded the sale of Firebar to Anning-Johnson during the period of Mr. Catrett's employment. These documents, the Court said, went a long way toward creating a genuine issue with respect to Mr. Catrett's exposure to Firebar.

Fourth, the majority determined that the record reflected a direct link among Carey-Canadian Asbestos, Panacon Corporation, and Celotex. Thus the majority found a clear link between Celotex and Firebar.

Judge Bork, in a strong dissent, concluded that plaintiff had not met her burden of causation because she had not identified anyone with personal knowledge that Mr. Catrett was exposed to asbestos. The dissent disagreed with the majority's view that plaintiff's mere listing in interrogatory answers of Mr. Hoff as a

potential witness, in light of his letter, was sufficient to stave off summary judgment. Judge Bork disagreed with that aspect of the majority opinion for two reasons: first, the sum total of all "evidence" offered by plaintiff falls far short of suggesting that anyone can testify from personal knowledge about any asbestos exposure. Second, and also dispositive, the Hoff letter itself is inadmissible as evidence and thus cannot be considered by the court in evaluating the summary judgment motion.

In contrast to the majority, which stated that it did not pass judgment on the admissibility of the Hoff letter, Judge Bork expressly found that the letter itself was inadmissible. His dissent vigorously argued that since a letter is not among the specific materials listed in Rule 56, it is inadmissible hearsay. Judge Bork also

determined that the letter did not fall within the "business records" exceptions to hearsay, see Fed. R. Evid. 803(6). In fact, Judge Bork's view was that the letter was made in the course of this litigation.

Finally, Judge Bork, relying upon the record, rejected the majority's argument that Celotex had not opposed the admissibility of the letter. In fact, he specifically found that plaintiff had conceded this point in her brief.

Judge Bork concluded that:

> the majority's view may make decisions on summary judgment both more difficult and more uncertain because the majority's rationale suggests that trial judges must consider various permutations of vague and inadmissible evidence in reaching those decisions. This indicates that the 'directed verdict' standard for evaluating summary judgment motions does not apply only to the evidence currently before the trial court on the motion for summary judgment but also to evidence that may emerge in the later course of the proceedings. That

> amounts to an automatic and unrequested extension of the time that is available for plaintiff to produce admissible evidence. This approach represents a departure from the Supreme Court's admonition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp., 106 S. Ct. at 2555 (quoting Fed. R. Civ. P. 1). I respectfully dissent. Catrett v. Johns-Manville Sales Corp., et al, No. 83-1694, slip op. at 5 (D. C. Cir. Aug. 7, 1987) (Bork, J., dissenting) App. 22A-23A.

On September 30, 1987, the District of Columbia Circuit denied a Petition for Rehearing, Appendix D, and Suggestion for Rehearing En Banc, Appendix E.

REASONS FOR GRANTING THE PETITION

This case merits the Court's review because the majority opinion by the District of Columbia Circuit contradicts principles of summary judgment law established by this Court's decision in

Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986). The majority opinion ignores this Court's clear holding that a summary judgment motion may not be opposed with inadmissible evidence.

Further, despite this Court's mandate to the District of Columbia Circuit that it determine whether plaintiff's showing, if reduced to admissible evidence, would be sufficient to carry her burden of proof at trial, the majority opinion expressly claims not to pass on the admissibility of plaintiff's proffered evidence. Instead, without finding that plaintiff's evidence could be reduced to admissible evidence, the majority remands the case to the District Court.

Finally, the majority's application of the principles established in Celotex Corp., 106 S. Ct. 2548 (1986), undermines the work of this Court in that case, and in

Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986), both of which represent a clear pronouncement, to all courts, of the purposes and principles underlying summary judgment procedure.

ARGUMENT

I.

A PARTY MAY NOT OPPOSE A MOTION FOR SUMMARY JUDGMENT WITH INADMISSIBLE EVIDENCE WHERE THERE IS NO INDICATION THAT THE EVIDENCE CAN BE MADE ADMISSIBLE.

The mandate of this Court to the Court of Appeals was to determine the adequacy of the showing by Mrs. Catrett in opposition to Celotex's motion for summary judgment, and to determine whether such a showing, if reduced to admissible evidence, would be sufficient to carry Mrs. Catrett's burden of proof at trial. This Court commented that the Court of Appeals, with its superior knowledge of local law, is better

suited to make these determinations. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2555 (1986).

When it first addressed this case, the Court of Appeals reversed the judgment of the District Court but did not reach the evidentiary issues because it found that Celotex had not met its initial burden under Rule 56. Catrett v. Johns Manville Sales Corp., 756 F. 2d 181, rev'd, 106 S. Ct. 2548 (1986). The purpose of this Court's remand to the Court of Appeals was to "address this aspect of the case." Celotex Corp. v. Catrett, 106 S. Ct. at 2556 (White, J., concurring).

Instead, the Court of Appeals has undertaken a re-examination of the fundamental principles underlying summary judgment. In so doing, the Court has distorted the interpretation of Celotex, thereby diminishing its effect on summary

judgment procedure.

Moreover, the majority decision by the Court of Appeals once again does not decide the evidentiary issues, stating instead that, as to the Hoff letter, "we need not and do not pass judgment on its admissibility". Catrett v. Johns Manville Sales Corp., No. 83-1694, slip op. at 10 (D.C. Cir. Aug. 7, 1987) [hereinafter cited as Catrett], App. 10A. The Court of Appeals evaded the question of the adequacy of Mrs. Catrett's showing by focusing instead on the majority's perception that since Celotex did not oppose the admissibility of the Hoff letter in the District Court, the letter could be considered in determining whether summary judgment was improper. Judge Bork, in his dissent, directly addressed the question of the admissibility of the Hoff letter, finding that it was inadmissible as

evidence and that the fact of its inadmissibility was dispositive of the case. Catrett, App. 20A.

Despite the opinion of the majority, the Hoff letter is clearly inadmissible. Under the Federal Rules of Evidence, the letter is hearsay; it is not under oath and does not purport to be based upon personal knowledge. In fact, Mr. Hoff, the author of the letter, is the "Assistant Secretary" of a large corporation with offices and branches across the country. Nothing in the letter purports to speak to Mr. Hoff's familiarity either with Mr. Catrett himself, or with his work specifically. The letter certainly lacks the "specific facts" requirement of Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986).

Furthermore, the references to what "we understand" and "our understanding"

also indicate that the letter is not based upon personal knowledge.

Perhaps most significantly, even counsel for the Plaintiff did not contend in the District Court, or in the appeal to the Court of Appeals, that Mr. Hoff had any personal knowledge of the facts set forth in his letter. Although Celotex submitted an affidavit from Mr. Hoff with a Motion to Reopen The Record, the District of Columbia Circuit denied Celotex's Motion on October 29, 1986 and therefore Mr. Hoff's affidavit is not before this Court.

Although stating that it did not reach the question of the admissibility of the Hoff letter, the majority suggests that the letter might be admissible under the business records exception to the hearsay rule. See, Federal Rules of Evidence, Rule 803(6). This is the only specific provision of the Federal Rules of Evidence

which the majority contends might cause the letter to be admissible. The difficulty with this position is that the letter meets virtually none of the requirements of Rule 803(6). First, the rule requires that the document be created "at or near the time" of the events recorded in the document. On its face, the letter was written in 1981 and related to a period ten years earlier. No case decided by this or any other court has ever held that a document created years after the events described therein meets the contemporaneity requirement. In fact, in United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983), the Court of Appeals held that a delay of one year and ten months between the date of a memorandum and some of the events it describes "does not meet the exception's 'timeliness requirement,' and therefore it is not admissible under Rule 803(6)." Id. at 1350.

Similarly, in United States v. Kim, 595 F. 2d 755 (D.C. Cir. 1979), this Court held that the timeliness requirement was not satisfied with respect to a document prepared approximately two years after the events recorded. This Court further held in Kim that a document not prepared timely could not be admitted under Rule 803(6) even if the lack of timeliness did not affect the trustworthiness of the document and even if the document in question was prepared as a result of the review of records which were themselves prepared in a timely fashion. Id. at 760.

The lack of timely preparation is not the only reason that the Hoff letter is not admissible under Rule 803(6), however. That Rule also requires that the record be made "by, or from information transmitted by, a person with knowledge...." In the present case, there is absolutely nothing

which even suggests that this requirement of the Rule was met.

Rule 803(6) also requires that it have been "the regular practice of that business activity to make the memorandum, report, record, or data compilation" in question. This requirement is clearly not met in the present case. The Hoff letter was specifically written as a result of this litigation in response to a request for information. Documents prepared specifically as a result of the existence of litigation have consistently been held not to be covered by Rule 803(6), both for the reason that they are not made as a regular practice of a business activity, and that the "circumstances of preparation indicate lack of trustworthiness." Federal Rules of Evidence, Rule 803(6).

For example, in Palmer v. Hoffman, 318 U.S. 109 (1943), this Court held that an

accident report prepared by a railroad engineer as a result of the normal practice of the railroad was not admissible under the statutory predecessor to Rule 803(6). If one substitutes the word "fireproofing" for "railroading," the words of Justice Douglas are as applicable to the present case as they were to Palmer:

> In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

Id. at 114.

It is apparent on the face of the Hoff letter that it was specifically prepared in response to this litigation. Such documents have never been held to be within the "business records" exception to the hearsay rule. In fact, since it was

not the routine practice of decedent's employer to prepare documents such as the Hoff letter, that letter is even more clearly objectionable than was the accident report in Palmer.

The Advisory Committee's Note to Rule 803(6) makes it clear that the rule announced by the Supreme Court in Palmer continues to be the law under the Federal Rules of Evidence. The Court of Appeals also made clear in Lemire, 720 F.2d 1327 that the Palmer rule continues to be the law in the District of Columbia Circuit.

The majority also states that the Hoff letter, read in conjunction with Mrs. Catrett's supplemental interrogatory responses, disclosed the existence of a witness with specific knowledge of decedent's asbestos exposure. Catrett, App. 12A. According to the majority, this response, taken with the Hoff letter, is

sufficient to require Celotex to have demonstrated to the trial court, through the submission of a deposition or affidavit from Mr. Hoff, that in fact he had no relevant information to offer. In support of its position, the majority relies upon the response from Celotex's counsel to a question from Justice White during oral argument. Catrett, App. 12A, n. 11. Justice White's question, and Celotex's response, both assume the existence of a person with actual knowledge of relevant facts. In the absence of the existence of such a person, a Rule 56 motion for summary judgment must be granted. Although there is nothing in this record to indicate the existence of a person with personal knowledge, the majority connects the dots necessary to make such a finding, yet ignores the one fact that is plainly clear. There is nothing in the record to

indicate the existence of any witness with personal knowledge as to Mr. Catrett's asbestos exposure.

Clearly a party cannot convert inadmissible evidence into admissible evidence simply by naming a witness and attaching an inadmissible document to a discovery response or other pleading. Celotex's response to Justice White's question was clearly the correct response; Celotex would not suggest that a party could simply ignore the existence of a witness with personal knowledge of relevant facts and then assert that a party cannot meet its burden of proof at trial.

The position of the majority ignores important differences between a document such as the Hoff letter and answers to interrogatories. First, answers to interrogatories must be under oath. Although a party may answer

interrogatories based in part upon the knowledge of his attorneys -- and is indeed required to do so -- he must certify that the answers are true and correct to the best of his knowledge, information and belief.

Second, Rule 11 of the Federal Rules of Civil Procedure provides for sanctions when an attorney signs a paper in the absence of a belief "formed after reasonable inquiry" that the contents of the paper are "well grounded in fact...." Had Plaintiff responded to Celotex's interrogatories relating to the identity of her product identification witnesses, she would have had to represent that Mr. Hoff had specific personal knowledge of decedent's exposure to Celotex products. In her pleadings plaintiff never represented, or even indicated, that Mr. Hoff's letter was based upon any personal

knowledge whatsoever.

Finally, the majority apparently also believes that the Hoff letter should be considered as a proper opposition to Celotex's summary judgment motion because "Celotex never objected to the District Court's consideration of the Hoff letter." Catrett, App.11A, (Emphasis in original). In his dissent, Judge Bork finds that Celotex opposed the admissibility of the letter. In fact, Judge Bork states that "[A]t no stage of these proceedings has any party even suggested the contrary", Catrett, App. 21A-22A. Neither the Court of Appeals, in its original decision, this Court, nor the Plaintiff, ever took the position that Celotex had not objected to the consideration of the Hoff letter on the basis of its inadmissibility. In fact, as Judge Bork's dissent points out, Plaintiff concedes that the district court

"apparently accepted Celotex's argument that the documents submitted by Mrs. Catrett were irrelevant because they would not, themselves, be admissible at trial." Catrett, App. 23A. Although it is true that inadmissible documents, if not challenged, may be considered by the trial court in ruling on a summary judgment motion, the only source cited by the majority in support of that proposition was 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, Sec. 2722, at 60-61 (2d ed. 1983). The cases cited in that source are primarily ones in which the appellate court affirmed the action of the trial court, despite an argument made for the first time on appeal that the documents on which the trial court based its action were inadmissible. See, e.g., Auto-Drive-Away Co. of Hialeah, Inc. v. ICC, 360 F. 2d 446 (5th Cir. 1966); Lawson v. American

Motorists Insurance Co., 217 F.2d 724 (5th Cir. 1954); FDIC v. Lauterbach, 626 F.2d 1327 (7th Cir. 1980).

The cases cited above are simply one application of the familiar rule that the decision of the trial court is presumed to be correct and that, in the absence of an objection in the trial court, claimed errors of that court may not be raised for the first time on appeal. In no case has an appellate court reversed a trial court's ruling on a summary judgment motion on the basis of documents which obviously were neither admissible nor based on personal knowledge.

II.

THE MAJORITY OPINION UNDERMINES THE UTILITY OF THIS COURT'S OPINIONS IN CELOTEX CORP. v. CATRETT, 106 S. CT. 2548 (1986) AND ANDERSON v. LIBERTY LOBBY, INC., 106 S. CT. 2505 (1986).

Even more perplexing is the majority's apparent view that since the District Judge asked to see the Hoff letter and was in fact shown a copy of the letter, therefore the letter was "duly considered by the court in reaching its decision." Catrett, App. 11A. This aspect of the majority's opinion is particularly troublesome given the state of the record in the district court. Surely the fact that the trial court looks at a document, the significance of which is in controversy, does not mean that the document can be considered as an appropriate opposition to a motion for summary judgment. However, that is the interpretation intended by the majority.

Following the majority's rationale, no trial judge may ever rule on the admissibility of a document by referring to the document itself. Considering the level

of intensity with which summary judgment motions are argued in the trial courts, it may be virtually impossible for counsel to always be certain that unambiguous objections to the admissibility of evidence have been made on the record. The amount of confusion that such a strict requirement would have on trial practice is immeasurable.

The majority's interpretation of the record seems to follow a path meant to lead to a predetermined conclusion. Celotex specifically pointed out to the trial court that the letter was not under oath, that there was no affidavit to support it, and that there had been no co-workers identified who could testify that the decedent was exposed to Celotex products in the District of Columbia area "or in any other area, including Chicago." App. 26A. Celotex further pointed out that it's

position was identical to that of Johns-Manville, which had previously been granted summary judgment, because while there had been some suggestion of exposure, "there is no affidavit to support that exposure by way of co-workers." App. 27A.

Almost immediately after examining the Hoff letter, the District Judge granted Celotex's motion for summary judgment, stating that there was "no showing that the plaintiff was exposed to Celotex's products in the District of Columbia or elsewhere...." App. 30A. Under the circumstances, to state that Celotex failed to preserve its objection to consideration of the Hoff letter is completely unrealistic.

A fair reading of the entire record reveals that no one at the hearing could have had any doubt but that Celotex was strenuously arguing against the sufficiency

of the Hoff letter as a basis for opposition to the summary judgment motion. This fact is confirmed by Plaintiff's brief, which reflects the understanding of Plaintiff's counsel that the trial court "apparently accepted Celotex's argument" concerning the inadmissibility of the Hoff letter. See, Catrett, App. 22A.

The majority's reversal of the District Court is thus based upon an understanding of the record which has never been the understanding of, or urged by, any party to this case. Under the circumstances, the majority is treating the summary judgment procedure not as a part of the Federal Rules which is important in securing "the just, speedy, and inexpensive determination of every action," but as the "disfavored procedural shortcut" which this Court has previously emphasized in this case that it is not. Celotex Corp. v.

Catrett, 106 S.Ct. at 2555.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1694

MYRTLE NELL CATRETT, ADMINISTRATRIX OF THE ESTATE OF LOUIS H. CATRETT, DECEASED, APPELLANT

v.

JOHNS-MANVILLE SALES CORPORATION, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 80-02232)

Argued April 22, 1987

Decided August 7, 1987

Peter Enslein, with whom *Peter T. Nicholl* and *James F. Green* were on the brief for appellant.

Leland Van Koten, with whom *H. Emslie Parks* was on the brief for appellees.

Before: WALD, *Chief Judge*, BORK and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* STARR.

Dissenting opinion filed by *Circuit Judge* BORK.

STARR, *Circuit Judge*: This case is before us on remand from the Supreme Court. The sole question is whether the District Court properly granted summary judgment in favor of an asbestos manufacturer in a suit brought by the survivor of a victim of asbestosis. The underlying litigation began in 1980 when Myrtle Nell Catrett, the appellant in this action, commenced suit in federal district court against 15 named corporations that manufactured or distributed products containing asbestos. Mrs. Catrett's husband, Louis Catrett, had died a year earlier, having devoted a lifetime's work to construction activities involving the use of various asbestos products.

One of the defendants named in Mrs. Catrett's lawsuit was Celotex Corporation, the sole defendant now before us. The District Court granted Celotex's motion for summary judgment, concluding that there was no evidence of Mr. Catrett's exposure to Celotex's products. In our earlier opinion in this case, however, a divided panel reversed. In the panel majority's view, Celotex, by offering no supporting evidence, failed to file a properly supported motion for summary judgment as required by Federal Rule of Civil Procedure 56(e). *See* 756 F.2d 181 (D.C. Cir. 1985). Since the majority found Celotex's motion facially inadequate, we did not consider whether Mrs. Catrett's response sufficed to demonstrate a "genuine issue for trial." *See id.* at 184-85; Fed. R. Civ. P. 56(e) (after properly supported summary judgment motion is filed, burden is on party opposing summary judgment to show "genuine issue for trial").

The Supreme Court reversed. 106 S.Ct. 2548 (1986). Agreeing with Judge Bork's dissent, the Court instructed

that while "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' " *id.* at 2553 (quoting Fed. R. Civ. P. 56(c)), that support its motion, such an identification is sufficient properly to support a summary judgment motion. Having thus concluded that Celotex had met its initial burden of production and filed a proper summary judgment motion,[1] the Court reversed and remanded the case, suggesting that our "superior knowledge of local law" made us "better suited" to address questions we had previously found unnecessary to consider, namely

> the adequacy of the showing made by [Mrs. Catrett] in opposition to [Celotex's] motion for summary judgment, or . . . whether such a showing, if reduced to admissible evidence, would be sufficient to carry [Mrs. Catrett's] burden of proof at trial.

Id. at 2555. We thus are called upon to determine whether Mrs. Catrett's showing was sufficient to avoid summary judgment under Federal Rule of Civil Procedure 56(e).

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[1] Justice Brennan's dissent suggests that on remand this court "should reevaluate whether the defendant met its initial burden of production." 106 S.Ct. at 2556 n.1 (Brennan, J., dissenting). Justice Brennan's suggestion, coming in the face of what seems to us the clear conclusion by the majority that the burden has been met, *see id.* at 2555, is based upon the argument that Justice White, in his separate concurrence, *id.* at 2555 (White, J., concurring), "plainly believes" reevaluation is appropriate and that Justice White's views should control. *Id.* at 2556 n.1 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Upon reflection, we believe it prudent not to accept the invitation. Justice White did, after all, join the opinion of the majority and thus that opinion controls our examination of the case on remand. *Compare Marks*, 430 U.S. at 193 (discussing situation where no opinion is joined by a majority of Justices).

I

Before proceeding to an evaluation of Mrs. Catrett's showing, we first need to review, briefly, the course of this litigation as it relates to Celotex. The first significant event bearing on the summary judgment issue occurred in February 1981 with the filing of a joint set of interrogatories by all defendants. Three of these interrogatories are particularly relevant to our inquiry. The first, number 26, asked Mrs. Catrett to identify "persons having knowledge of facts relevant to the subject matter in this lawsuit" and to indicate which of those persons she "intend[ed] to produce as witnesses in the trial in this action." Docket Entry (D.E.) 47 at 10. The second and third, numbers 51 and 52, were more specific, seeking detailed information concerning Mr. Catrett's work with asbestos, asking, *inter alia*, for the "type and identity of each such asbestos material with which [he] had contact." *Id.* at 14-16.

Mrs. Catrett filed her answers in June 1981. Her response to numbers 26, 51, and 52 was the same; she simply indicated that she would respond later, in supplemental answers. *See* D.E. 61 at 18, 25.[2]

Three months later, in September 1981, Celotex filed its first motion for summary judgment, the central thrust of which was that Mrs. Catrett had "failed to show the decedent came into contact with any product containing asbestos designed, manufactured, or distributed by Celotex." D.E. 77.

Mrs. Catrett filed an opposition to that motion in October 1981.[3] In response to the contention that she had

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[2] One other interrogatory response is relevant. In answer to interrogatory number 9, which asked her to identify all of Mr. Catrett's employers, Mrs. Catrett listed Anning-Johnson, a company in Melrose Park, Illinois, as Mr. Catrett's employer for part of 1970 and all of 1971. *See* D.E. 61 at 7.

[3] Before Mrs. Catrett filed her opposition, Celotex filed its answers to her interrogatories. Two related items from these

failed to demonstrate her late husband's exposure to Celotex's products, Mrs. Catrett directed the court's attention to three items, which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial": (1) a transcript of Mr. Catrett's testimony in a workmen's compensation claim, in which he indicated his exposure to a product called "Firebar" while working for a company called Anning-Johnson in the Chicago, Illinois area; (2) a letter from the Assistant Secretary of Anning-Johnson, T.R. Hoff, to a Mr. O'Keefe of Aetna Casualty & Surety, Anning-Johnson's insurance company, reporting on Mr. Catrett's employment with Anning-Johnson [4]; and (3) a letter from Aetna's Mr.

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answers are relevant. First, in a preliminary statement, Celotex identified itself as a "successor-in-business" to various companies "which were engaged in the manufacture and sale of asbestos containing insulation products," and indicated that its "involvement in the asbestos insulation business began with its purchase of Panacon Corp. in 1972." D.E. 80 at 1. Second, in an attached exhibit, Celotex offered a more detailed description of the Panacon merger:

> On June 30, 1972, Panacon Corporation was merged into The Celotex Corporation . . . . This merger was also statutory, and The Celotex Corporation assumed the assets and ordinary liabilities of Panacon Corporation.

Id. exhibit A. Thus, the record before the District Court reflected, at that early stage, a direct link between Celotex and Panacon. Moreover, Celotex's interrogatory responses expressly state that it had assumed Panacon's ordinary liabilities, a statement Celotex's counsel confirmed and amplified at oral argument before this court on remand from the Supreme Court.

[4] Mr. Hoff went on to indicate that "[w]e understand that the Firebar product was manufactured by Carey-Canadian." D.E. 87 Exhibit D. Celotex seizes upon this "understand" language to suggest that Hoff's letter was based only on a general corporate understanding rather than the requisite personal knowledge. *See* Supplemental Brief of Appellee at 5; *cf.* Fed. R. Civ. P. 56(e) (requiring affidavits to be made

O'Keefe to Mrs. Catrett's counsel essentially restating the contents of the Hoff letter. D.E. 87.[5] In the wake of Mrs. Catrett's filing, Celotex in November 1981 withdrew its motion for summary judgment. D.E. 97.

One month later, Celotex took another tack, filing a motion for a change of venue. The motion sought transfer of the case to the Northern District of Illinois. D.E. 129. In its accompanying Memorandum of Points and Authorities, Celotex set forth the following basis for its motion: Mr. Catrett was based in the Chicago area "at all times during his alleged exposure to any product manufactured by The Corporation and/or its subsidiaries." *Id.* Celotex attached to its memorandum four supporting exhibits, two of which are relevant here. The first, labeled "Deposition of Decedent," was a portion of the same workmen's compensation testimony Mrs. Catrett had submitted in her opposition to Celotex's earlier (withdrawn) motion for summary judgment. *Compare id.* Exhibit A *with* D.E. 87 Exhibit E. As noted above, in this testimony Mr. Catrett recounted his use of an asbestos product named Firebar while working for

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on personal knowledge). In our view, the letter cannot fairly be read as Celotex urges. The earlier part of the letter, discussing Mr. Catrett's work for Anning-Johnson, purports to state facts (presumably) within Hoff's personal knowledge. It is only when Hoff moves from intra-Anning-Johnson matters that he begins to use the more cautionary "understand" language.

[5] When she filed her opposition, Mrs. Catrett apparently also indicated that she would be calling Mr. Hoff as a witness. *See Celotex Corp. v. Catrett*, 106 S.Ct. at 2559 (Brennan, J., dissenting) (citing Transcript of Supreme Court Oral Argument at 6-7, 27-29, *reprinted in* Supplemental Brief of Appellee Appendix 2). Mr. Hoff was actually listed as a witness in February 1981, after Celotex's second summary judgment motion was filed, in Mrs. Catrett's Supplemental Answers to Defendant's Interrogatories, as a response to interrogatory number 26. D.E. 161.

Anning-Johnson. The second exhibit of relevance for our purposes was a collection of purchase orders reflecting the sale and shipment of Firebar to Anning-Johnson. Several of these documents evidenced the shipment of Firebar from an entity called "Carey-Canadian Asbestos," which is identified in those documents as "A Division of Panacon Corporation," to Anning-Johnson during 1971. That was, of course, the period when Mr. Catrett worked at Anning-Johnson in the Chicago area. *See id.* Exhibit D.[6]

Shortly after filing its change of venue motion, Celotex renewed its motion for summary judgment. The second motion was differently crafted from the first, aborted motion; now, Celotex contended that Mrs. Catrett had failed to show exposure "within the jurisdictional limits" of the District Court, a rather different point than that advanced in its geographically unlimited initial motion. D.E. 137. Celotex's memorandum supporting this second motion likewise limited the claim to Mrs. Catrett's asserted failure to show exposure to a lack of "any such evidence [of exposure to Celotex products] *within the jurisdictional confines of* [*the District*] *Court.*" *Id.* (emphasis added).

In January 1982, Mrs. Catrett filed an opposition to Celotex's new summary judgment motion, again directing the court's attention to the three evidentiary items upon which she had originally relied: (1) the workmen's compensation testimony of Mr. Catrett; (2) the Hoff letter; and (3) the O'Keefe letter. D.E. 142. Then in February 1982, Mrs. Catrett filed Supplemental Answers to Defendant's Interrogatories, including interrogatory

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[6] Mrs. Catrett filed an opposition to Celotex's motion for a change of venue in February 1982. D.E. 164. The District Court heard argument on the change of venue motion together with Celotex's second summary judgment motion in July 1982. *See also infra* note 8.

number 26, referred to above.[7] In her supplemental response, Mrs. Catrett listed "T.R. Hoff, Assistant Secretary, Anning-Johnson Company" as a person "having knowledge of facts relevant to the subject matter in this lawsuit." She further indicated that Mr. Hoff would be called as a witness at trial. D.E. 161.

This is where matters stood in July 1982, when the District Court held a hearing on Celotex's motions for a change of venue and summary judgment. In that hearing, counsel for Celotex addressed the three items of evidence relied upon by Mrs. Catrett. Although Celotex had itself submitted the decedent's workmen's compensation testimony to support its change of venue motion (and argued that the District Court should consider the testimony "for the limited purposes of use in this motion"[8]), Celotex nonetheless objected to the testimony on the ground that it "would not be admissible." D.E. 184B at 4 (Transcript of the July 1982 proceeding). No such objection, however, was interposed with respect to the Hoff letter's admissibility or relevance, although to be sure Celotex did generally disparage the letter's value. At the conclusion of the hearing, the District Court granted Celotex's motion for summary judgment on the

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[7] Mrs. Catrett did not respond, however, to interrogatories number 51 and 52 in her supplemental answers. Celotex makes much of this fact. *See* Supplemental Brief of Appellee at 5-6. We decline to give overmuch weight to this obviously unacceptable tack on the part of appellant because that omission is more properly brought to the District Court's attention as a failure to comply with a proper discovery request. *Cf.* Fed. R. Civ. P. 37. Celotex, together with other defendants, did file a motion to compel, *see* D.E. 68, but the motion was never ruled by the trial court. In these circumstances, it seems to us that Celotex should be able to make nothing more *before us* of Mrs. Catrett's failure to respond to the two interrogatories.

[8] Presumably, Celotex's counsel was referring in this colloquy to the change of venue motion.

spot, ruling from the bench that there had been "no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." *Id.* at 9.[9] No opinion was forthcoming.

The correctness of this ruling, in light of the record before the District Court, is the issue we face today. More specifically, the precise question is whether the record before the District Court at the moment of truth evidenced a genuine issue of material fact. We are emphatically not called upon to decide whether this action must go to trial or whether, to the contrary, the case could be disposed of on summary judgment on the basis of a more fully developed record. Our sole and limited task is to assess with care the record before the District Court at the time it granted Celotex's summary judgment motion and to determine whether that ruling

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[9] In our previous opinion in this case, we observed that during the hearing the District Court focused, almost exclusively, on the notion that the only alleged exposure occurred outside the District of Columbia and on the issue of venue. *See* 756 F.2d at 185 n.14; *see also id.* at 183 n.3. We repeat that observation here. We nonetheless gave dispositive weight to the District Court's inclusion of the two words, "or elsewhere," because, as we noted, it was only the inclusion of that phrase that made the District Court's ruling "even conceivably proper." *Id.* at 185 n.14. Justice Stevens discussed this point in his dissent, arguing that the District Court was clearly granting summary judgment "on the basis of no exposure in the District of Columbia," a ruling Justice Stevens described as "palpably erroneous." 106 S.Ct. at 2561 (Stevens, J., dissenting). Although we would agree with Justice Stevens' observations, if that were indeed the trial court's ruling, we are nonetheless constrained not to pierce the veil, as it were, of the District Judge's actual words; we thus once again treat the District Court's ruling as a bona fide grant of summary judgment on the basis of no evidence of exposure in the District of Columbia *or elsewhere*. *See also id.* at 2551 n.2 (majority's discussion of Justice Stevens' dissent).

was proper in light of the state of the record at that juncture.

II

Upon review, we discern several items pointing to the existence of a genuine issue concerning Mr. Catrett's alleged exposure to Celotex products. First, Mrs. Catrett (twice) submitted the letter from Mr. Hoff, the Anning-Johnson executive. This letter chronicles Mr. Catrett's work for Anning-Johnson, reporting that he worked for the company for "one calendar year ending, 12/22/71." According to the Hoff letter, Mr. Catrett's "duties were to supervise and train crews in the application of Firebar Fireproofing." D.E. 142 Exhibit C. Thus, on its face, the letter reflects knowledge by a specific Anning-Johnson official of the deceased employee's exposure to Firebar fireproofing. The letter further relates an "understanding" that the manufacturer of Firebar was now owned by Celotex. *See supra* note 4.

Confronted with this potentially damning piece of evidence, Celotex argues that the Hoff letter should be ignored by virtue of its asserted inadmissibility at trial. *See* Brief of Appellee The Celotex Corp. at 8-11; *see also* 10 A. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2721 (2d ed. 1983) (In passing on a summary judgment motion, a court may consider materials specified in Federal Rule of Civil Procedure 56(c) as well as "any material *that would be admissible or usable at trial.*" (emphasis added).

In the circumstances of this case, we believe that the Hoff letter should be considered. The inadmissibility of the letter, despite Celotex's contention to the contrary, is by no means obvious (although we need not and do not pass judgment on its admissibility). Mrs. Catrett argues that the letter is admissible, *see* Reply Brief for Appellant at 8-9, asserting that the Hoff letter is admissible as falling within the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6). *More impor-*

tantly, Celotex never objected to the District Court's consideration of the Hoff letter. To the contrary, in the hearing on Celotex's two motions, counsel for Celotex discussed in detail the substance of the Hoff letter, and at one point the letter was handed in open court to the District Judge (at his request) for his examination. *See* D.E. 184B at 4, 6.

In this situation, it could scarcely be clearer that the letter was before the District Court; what is more, in the absence of even a hint to the contrary from the trial court (much less a ruling), we can only presume that the document was duly considered by the court in reaching its ruling. After all, the District Judge specifically asked to see the document and was, as we just recounted, furnished a copy moments before handing down his ruling from the bench. Since it is well established that "inadmissible documents may be considered by the court if not challenged," 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2722, at 60 (2d ed. 1983),[10] we are satisfied that the Hoff letter is properly (at this stage) to be considered in assessing whether a genuine issue of fact exists.

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[10] "As is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged. The objection must be timely or it will be deemed to have been waived." 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2722, at 60-61 (2d ed. 1983) (footnotes omitted). Since here Celotex interposed no objection to the Hoff letter's admissibility—indeed, as we point out in text, Celotex dealt with the substance of the Hoff letter, D.E. 184B at 4—it is clear that the objection has been waived. As we have also noted, the District Court asked to see and was handed a copy of the Hoff letter. *Id.* at 6. We are not persuaded to the contrary conclusion by the dissent's assertion, Dissent at 4-5 n.1, based principally on an aposiopetic remark by counsel plus the word "either," that Celotex *did* object to the admissibility of the letter. But in any event, the District Court did consider the letter and ruled on the summary judg-

The second item also relates to Mr. Hoff. In her supplemental interrogatory responses, Mrs. Catrett listed Hoff as a witness. There can, of course, be no doubt that this response is properly considered in ruling on a summary judgment motion. *See* Fed. R. Civ. P. 56(c) (specifically listing "answers to interrogatories" as items that may be considered). Taking this response together with the Hoff letter, the record, dispassionately viewed, reflects the existence of a witness who can testify with respect to Mr. Catrett's exposure to Firebar.[11] Thus,

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ment motion only after having examined the letter. It strikes us as hypertechnical in the extreme to suggest that an objection (1) never clearly articulated by Celotex, (2) never ruled upon by the District Court, and (3) implicitly overruled by virtue of the District Court's consideration of the letter, would prevent us from taking into account, on appeal, the very evidentiary materials that were before the District Court in ruling on this motion.

[11] Indeed, counsel for Celotex conceded in oral argument before the Supreme Court that if Mrs. Catrett's interrogatory response listing Hoff as a witness had also described his testimony as reflecting exposure by Mr. Catrett—for example, by paraphrasing the contents of the Hoff letter—summary judgment would have been inappropriate. Under those circumstances, Celotex would then be obligated to take Hoff's deposition (or otherwise secure a statement from him by affidavit or declaration) in order successfully to move for summary judgment. *See* Transcript of Supreme Court Oral Argument at 43, *reprinted in* Supplemental Brief of Appellee Appendix 2. The situation in the record seems to us quite similar, functionally, to a more detailed interrogatory response. We are therefore puzzled by the dissent's assertion that this "falls far short of . . . even suggesting that anyone has been identified [with] personal knowledge about any asbestos exposure." Dissent at 3. Indeed, the conclusion we draw seems an eminently reasonable, if not inescapable, inference. It is entirely in keeping with the Supreme Court's admonition that "all justifiable inferences are to be drawn in . . . favor [of the non-movant] . . . [and] a trial court . . . may . . . deny summary judgment in a case where there is

even if the Hoff letter itself would not be admissible at trial, Mrs. Catrett has gone on to indicate that the substance of the letter is reducible to admissible evidence in the form of trial testimony. *See Celotex Corp. v. Catrett*, 106 S.Ct. at 2553 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.").[12]

Third, as we recounted above, the record contains several documents, *submitted by Celotex*, recording the sale of Firebar to Anning-Johnson during the period when Mr. Catrett worked there. *See* D.E. 129 Exhibit D. These documents operate to put Firebar and Mr. Catrett in the same place at the same time. Since Mrs. Catrett's interrogatory responses make it abundantly clear that Mr. Catrett's particular vocation was the application of fireproofing, these documents go a long way toward creating a genuine issue with respect to Mr. Catrett's exposure to Firebar.

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reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513-14 (1986).

[12] *See also Celotex Corp. v. Catrett*, 106 S. Ct. at 2555 (determination on remand is whether Catrett's showing "if reduced to admissible evidence" would be sufficient to carry her burden at trial); *id.* (White, J., concurring) ("A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case."); Supplemental Brief of Appellee at 7 ("The Supreme Court recognized that Rule 56 does not require the party opposing a summary judgment motion to put her evidence into admissible form .... A party is not excused, however, from demonstrating that its evidence can be put into admissible form....").

Fourth, the record reflects a direct link among the three corporate entities or divisions of relevance, namely Carey-Canadian Asbestos, Panacon Corporation, and Celotex. Carey-Canadian is identified in the sales records furnished by Celotex as the entity selling Firebar to Anning-Johnson, Mr. Catrett's employer. Those sales records describe Carey-Canadian as "A Division of Panacon Corporation." D.E. 129 Exhibit D. Celotex's interrogatory responses, in turn, relate that Panacon was merged into Celotex in 1972 (thus corroborating the more general statements as to corporate ownership found in the Hoff letter). The responses stated, in addition, that "[t]his merger was . . . statutory, and The Celotex Corporation assumed the assets and ordinary liabilities of Panacon Corporation." D.E. 80 Exhibit A. Thus, notwithstanding Celotex's protestations to the contrary, *see* Supplemental Brief of Appellee at 8-10, the record before the District Court evinces a clear link between Carey-Canadian and Celotex, and thus between Celotex and Firebar.

If Celotex desires to press its contention that it is not liable for any injury or death caused by the use of Firebar, it is obviously at liberty to do so. We need not and do not pass judgment on the merits of any such contention. Our conclusion in this respect is much narrower; we are satisfied that the record before the District Court when it granted summary judgment admits of only one conclusion—Celotex is responsible for the ordinary liabilities of Carey-Canadian.

III

Our task in determining whether these evidentiary items, taken together, render summary judgment improper is well marked out, both in the express language of Rule 56 and relevant Supreme Court precedent. Rule 56(c) directs that summary judgment is to be granted if the record shows

> that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). As the Supreme Court recently instructed in *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986), "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." The Court observed, furthermore, that the standard is identical to the standard for directed verdict; a court must ask

> whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 2512; *see also Catrett*, 756 F.2d at 188-89 (Bork, J., dissenting).

Considering the record before the District Court when it granted summary judgment [13]—in particular, the four items discussed above—we believe that the issue of exposure was not so one-sided that Celotex was entitled to judgment as a matter of law. The record contains sufficient evidence to create a genuine issue of material fact with respect to Mr. Catrett's exposure to the asbestos

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[13] We do not consider two items from the record: (1) Mr. Catrett's workmen's compensation testimony; and (2) the letter from Mr. O'Keefe to Mrs. Catrett's attorney. We believe it would be inappropriate to consider the first item. It is not unlikely that the evidence would be held inadmissible, *see* Fed. R. Evid. 804(b)(1); in addition, Celotex specifically objected before the District Court to its consideration (while at the same time using it for the limited purpose of supporting its change of venue motion). *See* D.E. 184B at 4. The second item, the O'Keefe letter, is not considered for a more basic reason. To paraphrase, liberally, Gertrude Stein's observation, there is nothing there to consider. The O'Keefe letter is merely a restatement of the contents of the Hoff letter and, as such, offers no independent evidence of a genuine issue of material fact.

product Firebar while working for Anning-Johnson. While the four items taken individually provide less than overpowering support for Mrs. Catrett's position, their cumulative effect is, we believe, sufficient to defeat the summary judgment motion.[14]

To recapitulate, the four items described above, together with certain other general information from both Mrs. Catrett's and Celotex's interrogatory responses, *see supra* notes 2 & 3, establish a sufficient linkage between Mr. Catrett and Firebar, and then between Firebar and Celotex, to create a genuine issue with respect to Mr. Catrett's exposure to Celotex products. First, the interrogatory responses show that Mr. Catrett worked as a fireproofer. *See* D.E. 61 at 3-8 (listing occupations). Indeed, that point, we gather, is uncontested. Second, the interrogatory responses show that Mr. Catrett worked for Anning-Johnson in 1971. *See supra* note 2. Third, the Hoff letter indicates that Mr. Catrett's duties at Anning-Johnson involved the application of Firebar fireproofing. *See* D.E. 142 Exhibit C. Fourth, the identification of Hoff as a witness who will be called at trial, *see* D.E. 161, suggests (on this record) that his trial testimony could detail Mr. Catrett's activities at Anning-Johnson (as well as perhaps establishing other potentially relevant facts, such as whether Anning-Johnson utilized other types of fireproofing). Fifth, the sales records sub-

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[14] We believe, with all respect, that the dissent incorrectly limits its examination to items identified by Mrs. Catrett that bear solely upon identifying an individual with personal knowledge of her late husband's exposure to asbestos. The proper inquiry, in our view, is whether a genuine issue of material fact exists with respect to Mr. Catrett's exposure to asbestos. This broader inquiry necessarily requires consideration not only of the two items considered by the dissent, but in addition (1) Celotex's submission showing that Firebar was used at Anning-Johnson at the time Mr. Catrett was employed there, and (2) record evidence linking the three relevant corporate entities.

mitted by Celotex to support its motion for change of venue indicate that Firebar was shipped by Carey-Canadian Asbestos, a division of Panacon Corp., to Anning-Johnson during 1971. *See* D.E. 129 Exhibit D. Sixth, and last, Panacon (and Carey-Canadian) merged with Celotex in 1972, with Celotex assuming the "ordinary liabilities of Panacon Corporation." D.E. 80 Exhibit A.

On this record, therefore, an unbroken chain links Mr. Catrett to Firebar, and Firebar to Celotex. Under the specific circumstances before us, we cannot, in conscience, conclude on this state of the record that no genuine issue of material fact exists with respect to Mr. Catrett's exposure to Celotex products. Accordingly, the District Court's grant of summary judgment was, on the basis of the record then before it, in error. We therefore reverse the judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

BORK, *Circuit Judge, dissenting*: In this case, a tort suit involving the alleged exposure of plaintiff's deceased husband to asbestos products, the district court granted summary judgment for the defendant manufacturer. The Supreme Court has now held that the defendant carried its burden, in presenting a motion for summary judgment, of coming forward with proof of the absence of any genuine issues of material fact. *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548 (1986). The issue before us on remand is to specify the *plaintiff's* burden in opposition to the motion and to assess whether the plaintiff has met her burden in this case. The majority finds that she has met her burden, and has made enough of a showing to defeat the motion for summary judgment. I disagree.

The Federal Rules of Civil Procedure state that when one party offers a properly supported motion for summary judgment, the other party's response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e). In *Anderson* v. *Liberty Lobby*, 106 S. Ct. 2505 (1986), the Supreme Court explicitly endorsed the requirement that "specific facts" must be set forth. *Id.* at 2511; *see also Laningham* v. *United States Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). The Court also said that there is no genuine issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 106 S. Ct. at 2511. This standard "mirrors" the standard for a directed verdict. *Id.*; *Celotex*, 106 S. Ct. at 2553; *United States* v. *General Motors Corp.*, 518 F.2d 420, 441-42 (D.C. Cir. 1975).

The central issue here on motion for summary judgment is causation. Defendant alleges that plaintiff has made no showing that anyone can offer personal knowl-

edge that any exposure to asbestos occurred in this case. I agree that plaintiff has not identified "specific facts" that would indicate such exposure occurred, and I certainly think that plaintiff has not made the kind of showing necessary to defeat a directed verdict motion. I would therefore grant defendant's motion for summary judgment.

Plaintiff has identified two items that may bear on whether anyone has personal knowledge of exposure to asbestos in this case. One is plaintiff's listing of T.R. Hoff, assistant secretary at a company where plaintiff's husband had been employed for one year, as a potential witness in the case. The other is a letter from Hoff to his company's insurer, which states from the company records the dates plaintiff's husband had been employed, his general duties, and the names of the manufacturers of asbestos products used by the company during that period. Together, these items are thought to provide sufficient "specific facts" to defeat a summary judgment motion on the issue of causation.

It would seem apparent that the mere listing of a potential witness, without more, does not constitute seting forth specific facts. Here plaintiff has never claimed that Mr. Hoff has any personal knowledge that her husband was exposed to asbestos during his year of work at this company, and indeed did not specify the grounds of his possible testimony at all, except to say that he would be able to testify about "facts relevant to the subject matter of this lawsuit." Docket Entry ("D.E.") 161. On the other hand, plaintiff has failed ever to answer interrogatories served by defendant that asked for a variety of specific items of information she might have about her husband's possible exposure to asbestos on any occasion. D.E. 47 at 14-16.

The majority concludes, however, that we should interpret plaintiff's listing of Mr. Hoff as a witness in light

of his letter to the insurance company, thereby finding enough evidence to stave off the equivalent of a motion for directed verdict on causation. This conclusion is incorrect for two reasons. First, the sum total of all this "evidence" falls far short of showing, or even suggesting, that anyone has been identified who can testify from personal knowledge about any asbestos exposure. That lack alone requires that defendant's motion for summary judgment be granted.

In addition, and also dispositive, the letter itself is inadmissible as evidence and thus cannot be considered by this court in evaluating the summary judgment motion. Rule 56 indicates that a trial judge should decide a summary judgment motion based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," Fed. R. Civ. P. 56(c), and "by examining the pleadings and the evidence before it and by interrogating counsel." *Id.* 56(d). It is settled law that the judge may consider only these specific materials or other evidence that would be admissible at trial. Inadmissible evidence is not to be considered unless, like an affidavit, it is "otherwise provided for" in Rule 56. *See* Fed. R. Civ. P. 56(e); *see also* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2721 (1983) ("[T]he particular forms of evidence mentioned in the rule are not the exclusive means of presenting evidence on a Rule 56 motion. The court may consider any material that would be admissible or usable at trial."); 6 J. Moore, *Moore's Federal Practice* ¶ 56.11[1.—8] (2d ed. 1972) ("[I]n addition to pleadings, depositions, admissions on file, answers of a party to interrogatories, and affidavits, which Rule 56(c) specifically enumerates, a court may consider oral testimony and any other or additional materials that would be admissible in evidence or otherwise usable at trial. Material that does not come within the above broad category should not be considered."). The strength

of this principle is shown by the manner in which a trial judge is supposed to treat affidavit testimony: if some of the testimony contained in the affidavit would be inadmissible if it were offered at trial (*e.g.*, as hearsay), the judge is to consider only the portions that would be admissible at trial and excise the remainder. *See* 6A J. Moore, *supra*, ¶ 56.22[1], at 56-1330 to 56-1331; 10A C. Wright, A. Miller & M. Kane, *supra*, § 2738, at 511.

Letters are not among the specific materials listed in Rule 56, and the Hoff letter is inadmissible hearsay. It was not made under oath, and does not purport to be based on personal knowledge. There has been some suggestion that it could fall within the "business records" exception to hearsay, *see* Fed. R. Evid. 803(6), but I think the suggestion is incorrect. Although the contents of the letter may have been gleaned from business records, the letter itself is not an item "kept in the course of a regularly conducted business activity," where it "was the regular practice of that business activity to make the memorandum, report, record, or data compilation." *Id.* Instead, the letter seems to have been written to respond to inquiries that were made in the course of this litigation. *See Palmer* v. *Hoffman*, 318 U.S. 109, 111-15 (1943).

The majority refers to the widespread view that unopposed material may be considered in deciding a summary judgment motion. Maj. op. at 7. The record in this case shows, however, that defendant opposed the admissibility of the letter.[1] At no stage of these proceed-

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[1] At the time the Hoff letter was considered in open court, defendant's counsel discussed it with the judge in a manner that indicated his opposition to admitting it as evidence. Counsel said: "Your Honor, *there is only a letter from the assistant secretary and that is not*"—at this point the judge interrupted with several questions, but then counsel finished —"We also have, and they rely on this, the deposition of the decedent that was taken of him prior to his death for the

ings has any party even suggested the contrary. Indeed, plaintiff's brief concedes this point, stating that the trial court "apparently accepted Celotex's argument that the documents submitted by Mrs. Catrett were irrelevant because they would not, themselves, be admissible at trial." Supplemental Brief for Appellant on Remand at 7. I thus can find no tenable basis for the suggestion that this court should consider the Hoff letter in evaluating the summary judgment motion.

For these reasons, I think plaintiff has not carried her burden in resisting summary judgment. On the causation issue, despite more than two years for discovery, she has been unable to present the district court with any "specific facts" beyond the vague listing of a potential witness not claimed to have any personal knowledge about exposure.[2] My concern is that the majority's view may make decisions on summary judgment both more difficult and more uncertain because the majority's rationale suggests that trial judges must consider various permutations of vague and inadmissible evidence in reaching those decisions. This indicates that the "directed verdict" standard for evaluating summary judgment mo-

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compensation claim, *which would not be admissible in this case either.*" D.E. 184B at 3-4 (emphasis added).

[2] The majority also points to documents that indicate business relationships between the defendant and one of the companies that employed plaintiff's husband. Maj. op. at 13-14. These documents are relevant on the causation issue, because if someone were able to testify from personal knowledge that plaintiff's husband was exposed to asbestos products during the time he worked for that company, these documents would help to establish some probability that the asbestos products he was exposed to were actually manufactured by the defendant. But these documents do not supply the crucial missing step on the causation issue, which involves specifying someone who can testify from personal knowledge about asbestos exposure. For the reasons given in the text, none of the other documents, including the Hoff letter, cures this omission.

tions does not apply only to the evidence currently before the trial court on the motion for summary judgment but also to evidence that may emerge in the later course of the proceedings. That amounts to an automatic and unrequested extension of the time that is available for plaintiff to produce admissible evidence. This approach represents a departure from the Supreme Court's admonition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp.*, 106 S. Ct. at 2555 (quoting Fed. R. Civ. P. 1). I respectfully dissent.

APPENDIX B

In The United States District Court
For the District of Columbia

Civil Action 80-2232

Myrtle Nell Catrett,

Plaintiff,

v.

Johns-Manville Sales Corporation, et al.,

Defendants.

Wednesday, July 21, 1982
Washington, D.C.

The above-entitled matter came on for a hearing before the Honorable CHARLES R. RICHEY, United States District Judge, Courtroom 11, commencing at approximately 1:00 p.m.

Appearances: Peter Nicholl, Esq., on behalf of the Plaintiff.

Charles Dorkey, Esq., Francis Ford, Esq., and William McMurtrie, Esq., on behalf of the Defendants.

(2) PROCEEDINGS

DEPUTY CLERK: Civil Action 80-2232, Myrtle Catrett versus Johns-Manville Sales Corporation, et al. For the plaintiff, Peter Nicholl; for the defendant, Charles Dorkey, Francis Ford, and William McMurtrie.

THE COURT: Who represents Celotex?

MR. McMURTRIE: Mr. McMurtrie, Your Honor.

THE COURT: Come forward. Do you want to argue your motion? That is what we are here for.

MR. McMURTRIE: Your Honor, I have two motions pending, one the motion for summary judgment and in the alternative, a motion to transfer for lack of venue. In the primary motion, Your Honor, the motion for summary judgment, I will be very brief because the Court has all the information I believe that it needs.

Our position is strikingly similar, if not exactly the same, as Johns-Manville in that although we have a registered agent in this area there has been no product identification of any Celotex products, both carries Philip Carey products, Carey Canada products, what have you, that have been used in the District of Columbia to which the decedent was exposed.

By the plaintiff's own documents, its own response to the Celotex inquiry, as well as the master set of interrogatories presented to this court, the only exposure (3) to any Celotex product by the decedent was in Chicago and by documents attached to their answers to interrogatories, there is a letter from a T. R. Huff, who is the assistant secretary for a corporation known as Annand & Johnson, saying that he did work for their company during that period December 22, 1970 to December 22, 1971 and at that time his duties were to supervise and train crews in the application of a fire-bar fireproofing.

Now, in 1980, or 1981, the interrogatories were propounded, the master set as well as my supplemental set. The Court gave them leave to file their answers to my supplemental set at a later date, February 9th, I believe, 1982. Those answers to date still would not satisfy that court as to product identification of any Celotex product or co-workers who would then identify on behalf of the

decedent, exposure to asbestos products manufactured by Celotex Corporation in this area or in any other area, including Chicago.

Your Honor, there is only a letter from the assistant secretary and that is not—

THE COURT: Doesn't plaintiff say that the decedent was exposed to your company's products in the area of Chicago.

MR. McMURTRIE: He suggested that there was exposure in Chicago, Your Honor. We do not admit that and (4) there is no affidavit to support that. We only have a self serving answer to interrogatories.

THE COURT: That says?

MR. McMURTRIE: It simply says — well, all it is is a letter from a Mr. T. R. Huff.

Now—

THE COURT: What does it say?

MR. McMURTRIE: It simply says that his duties were to supervise and train crews in the application of a fire-bar fireproofing. He worked only in new construction and traveled from district to district. That was in Chicago. We also have, and they rely on this, the deposition of the decedent that was taken of him prior to his death for the compensation claim, which would not be admissible in this case either.

THE COURT: Why?

MR. McMURTRIE: Celotex was not there, had no opportunity to cross-examine this defendant or this decedent. But he does say, for the limited purposes of use in this motion, that he was not exposed to any product in the District of Columbia manufactured by Celotex. He only worked in the Chicago area and its environs or in Los Angeles or New York, I believe.

THE COURT: What about their argument that the continued tortious effect of the exposure in Illinois (5) continued into the District of Columbia.

MR. McMURTRIE: Your Honor, I believe we would be governed by your ruling in 1976 in the Leaks versus Ex-lax case at 430 Fed. Supp. 413 that the tortious injury was in Chicago if he were exposed to a Celotex product or the asbestos fibers of a Celotex product in that area, but that any loss after that, as far as Celotex is concerned, forgetting Johns-Manville or any of the other 15 defendants who started in this case, was a pecuniary loss in the District of Columbia; but no further exposure in the District of Columbia and there is no affidavit supporting a further exposure by a Celotex product.

I think what we have here, Your Honor, is a time when these asbestos cases were first blooming in the District of Columbia, having happened in Norfolk and Philadelphia long before this, but there was a race to the courthouse by different law firms to gain control of a union. This case was inadequately prepared at the time to sufficiently identify the manufacturers of certain asbestos products.

We know, for example, that the decedent was exposed for a considerable period during World War II to asbestos products.

This court has already ruled in the Johns-Manville motion for summary judgment that although there is a (6) suggestion of exposure in 1952 and 1953 to J. M. Plaster products, there is no affidavit to support that exposure by way of co-workers. And that is exactly the same situation as Celotex is in.

THE COURT: All right. Let me hear from the other side.

MR. NICHOLL: Thank you, Your Honor.

Your Honor, Peter Nicholl for the plaintiff, sir. Regarding our substantiation that there was an exposure to a Celotex product we do have Mr. Huff's letter which states that he was exposed to fire-bar during the period of time for the year ending, I believe, December 1971, 1971 being the year in question.

By virtue of attachments to Celotex's motion to change venue, those attachments being the purchasing records from the Carey Canadian Mine Company to Annard & Johnson, the employer in Chicago, we do have indications that this fire-bar product was indeed an asbestos product and that that ties in the fact that this fire-bar fireproofing was an asbestos product.

THE COURT: Let me see the Huff letter.

Where does it say it was done in the District of Columbia?

MR. NICHOLL: I did not say in the District of Columbia.

(7) THE COURT: It had no contact with the District of Columbia.

MR. NICHOLL: I readily admit that there was no exposure to the Celotex products in the District of Columbia but that does not go to the question of the merits of the case for purposes of summary judgment. It may go to the question of changing venue, which is the other motion that Mr. McMurtie filed.

THE COURT: Was your client exposed to it in the District of Columbia?

MR. NICHOLL: No, sir, he was not. He was exposed to it in Chicago and I believe three or four other areas out west.

THE COURT: How can I entertain the action here and avoid granting their motion for summary judgment?

MR. NICHOLL: Summary judgment would go to the merits of the case by saying that we cannot prove exposure to their product. We can show exposure to their product.

THE COURT: What have you shown in opposition to their statement of material facts which are not in dispute?

MR. NICHOLL: We have opposed that, Your Honor, with our own in response to their motion.

THE COURT: You have what?

MR. NICHOLL: We have stated our own in response to their motion.

(8) THE COURT: You don't state it was exposed here.

MR. NICHOLL: No, sir, we admit he was not exposed to their product in Washington. But again that would go to a change of venue as opposed to summary judgment. In that regard—

THE COURT: Would they be obliged to defend an action in this district?

MR. NICHOLL: They do business in the district. They really admit that. Mrs. Catrett is still a resident of the district. Mr. Catrett was a resident of the district. Our witnesses are nearby in Virginia. It would be, I think, dilatory to transfer it to Chicago, I submit, but on the other hand, it again does not go to the merits of the case.

THE COURT: It can't be tried here, you know that.

MR. NICHOLL: I don't know that. I think it would do an injustice to Mrs. Catrett to exchange or to transfer the case to Chicago when it has been in front of Your Honor for two years.

THE COURT: When it has been in front of me for two years?

MR. NICHOLL: In front of the court here for two years.

THE COURT: Not in front of this court.

MR. NICHOLL: That is right. It was previously in (9) front of another judge.

THE COURT: What if we transfer it out to Chicago, you can't oppose that really, can you?

MR. NICHOLL: Your Honor, I can only oppose it on grounds that it would delay the matter, that it has already been approximately two years, that it would cause an inordinate cost to Mrs. Catrett being that she is a resident of the district, and we feel that it is her right to bring her action here. She can proof exposure but not in the district, and I think that should be certainly sufficient for the Court here to maintain jurisdiction over the action. If there is any hardship — Mr. McMurtrie doesn't really speak of any hardship that is going to accrue to him by keeping the case here.

THE COURT: He doesn't have to. All right. Anything else you want to say?

MR. NICHOLL: No, sir, Your Honor.

THE COURT: The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.

Let's have the Turner & Newall motion to dismiss for lack of jurisdiction, insufficiency of process or service of process.

(10) MR. DORKEY: Yes, Your Honor. My names is Charles Dorkey. I represent Turner & Newall on this motion.

THE COURT: Yes.

MR. DORKEY: I don't know whether you want me to recite the procedural history of the case or go to the facts.

THE COURT: Go to the facts.

MR. DORKEY: It seems to—

THE COURT: Why doesn't this court have jurisdiction?

MR. DORKEY: Because plaintiff has not made out the statutory prerequisites under either 13-423A3 or A4. And moreover, there is insufficient contacts for this court to constitutionally exercise its jurisdiction. Under A3 which requires an act in the jurisdiction and injury in the jurisdiction, plaintiff has shown no act by Turner & Newall in the jurisdiction. The cases supplied in my reply brief indicate that all of those cases involve automobile accidents in the district or an employee going into the district and hurting somebody.

In this case what the most we have is we have a product allegedly manufactured in England, shipped to a company in Pennsylvania, which company in Pennsylvania shipped it to a Virginia company, which Virginia company by its own unilaterally act used in the District of Columbia.

(11) Under A4 of the personal jurisdiction statute, that would clearly be, as alleged, an act without the jurisdiction and injury within. However, A4 requires substantial affiliating circumstances.

THE COURT: Are you familiar with the case of Collins versus New York Central? You didn't cite it.

MR. DORKEY: No, Your Honor.

THE COURT: You should have.

Go ahead. Your company isn't qualified to do business here, is it?

MR. DORKEY: No.

THE COURT: It does not maintain an office or telephone.

MR. DORKEY: And has not done so for ten years.

THE COURT: It has no contacts in the district.

MR. DORKEY: No, and we have put in four affidavits on this question. We have searched our records back ten years.

THE COURT: What about your wholly-owned subsidiary.

MR. DORKEY: Keasby & Mattison Company? First of all, for a wholly-owned subsidiary, plaintiff has made the insufficient allegations or indeed a showing to impute the acts of the subsidiary to Turner & Newall but even assuming that plaintiff has done that, there are two answers I have (12) to—

THE COURT: He never worked for Craft and Murphy or Keasby and Mattison.

MR. DORKEY: Plaintiff worked for Craft Murphy, that is clear. Plaintiff did not work for Keasby and Mattison. However, Keasby and Mattison — there is no proof that Keasby and Mattison had the affiliating circumstances with the District of Columbia. In order for the act from without the jurisdiction to cause injury within there has to be not only that act and injury within but there has to be affiliating circumstances of Keasby and Mattison. There is no showing that Keasby and Mattison had any of these affiliating circumstances.

THE COURT: Anything else you want to tell me?

MR. DORKEY: The only other thing is that section A4 speaks of present day affiliating circumstances Keasby was involved in 1962 and therefore it could not have done business anywhere for 20 years.

THE COURT: All right. Counsel.

MR. NICHOLL: Thank you, Your Honor. Your Honor, Mr. Catrett, by affidavit to our opposition to their motion, was exposed to a product known as limpet spray which Mr. Boil, the representative of Kraft Murphy states in an affidavit they purchased from Keasby Mattison and Armstrong Contracting and Supply, which was in fact purchased further (13) from Turner & Newall.

We further have an affidavit from Mr. Timmis, a co-worker, who states that he was exposed to limpet spray in 1962—

THE COURT: You are going awfully fast and some of the words are running right together, if I don't understand them, I don't think anyone else does either.

MR. NICHOLL: I will slow down.

THE COURT: You better start over again.

MR. NICHOLL: Okay. We have an affidavit in opposition to the motion to dismiss by Mr. Dorkey that an affidavit by Richard Boil of Craft Murphy, an employer of Mr. Catrett, that Mr. Catrett was indeed exposed to a product known as limpet spray.

THE COURT: Spell it.

MR. NICHOLL: L-I-M-P-E-T. We further have an affidavit from a Mr. Timmis, a co-worker of Mr. Catrett's, while he was employed at Craft Murphy.

THE COURT: Where?

MR. NICHOLL: At Craft Murphy in D.C., that he was exposed to limpet spray in 1962 while working on the U.S. capitol, and those affidavits are contained in our opposition to the motion to dismiss, Your Honor. We maintain that that of course is sufficient evidence.

THE COURT: That was in 1962, wasn't it?

(14) MR. NICHOLL: That is correct, sir.

THE COURT: How do you get around the statute of limitations, assuming there is sufficient jurisdiction personal jurisdiction here?

MR. NICHOLL: The discovery rule, Mr. Catrett wasn't aware of the disease process until the late seventies, that in fact his exposure at that time caused his mesothelioma.

THE COURT: What year?

MR. NICHOLL: What year did he contract the disease, sir?

THE COURT: Yes.

MR. NICHOLL: 1978.

THE COURT: When did he file suit?

MR. NICHOLL: In 1980, within three years of the date of discovery.

THE COURT: All right. Anything else you want to tell me?

MR. NICHOLL: Additionally, I think that further in that attachment to our opposition to their motion, I have a brochure from Turner Newall which states in the brochure that Keasby Mattison was one of their subsidiaries, and in that brochure it states something to the effect and I can cite the page, Your Honor, if you want me to, page 32 of that brochure — and it states that Keasby Mattison (15)

being in the United States was basically at the doorsteps of the entire country of the United States for purposes of distribution of their product.

We maintain that that knowledge on the part of Turner & Newall that distribution of its limpet spray to a subsidiary, Keasby Mattison, put them on knowledge within the foreseeability, as stated in the Volkswagen versus Woodson case, that their product could very well end up in the District of Columbia, like it did, and that Mr. Catrett could end up being exposed to their product, like he did, and that Mr. Catrett could end up developing a cancer, like he did, some 20 years later.

THE COURT: All right. Mr. Dorkey, do you want to respond?

MR. DORKEY: Just a few points, Your Honor.

First, in 1962, Craft Murphy was located in Virginia not in the District of Columbia. Second, for Keasby and Mattison, the brochure, the brochure on page three says, "Under the Turner & Newall's method of organization, under this method of working, the separate units in the organization, subsidiary companies, operate with a large measure of freedom and flexibility and local tradition and good will are fostered." This brochure is completely consistent with the several affidavits of the group of Turner Newall that Keasby was a wholly (16) owned but independently operated subsidiary of Turner Newall.

THE COURT: It did business in the District of Columbia, didn't it?

MR. DORKEY: Because it happened prior to 1962, I am not aware that it did business other than this single use of the product that Mr. Catrett's co-worker testified to, which was brought unilaterally by Craft Murphy to the District of Columbia.

It is not clear to me, and the record doesn't show and I think that this is one of the great problems with these cases, that you are dealing with events 20, 30, 40 and 50 years ago and there is no way that people can know these things.

THE COURT: Anything else?

MR. DORKEY: No, Your Honor.

MR. NICHOLL: Your Honor, could I add something very quickly, sir, and that is that in 1955 according to Mr. Boil's affidavit, Craft Murphy was located at 2302 Wisconsin Avenue, Washington, D.C.

THE COURT: The motion is overruled.

Who wants to speak for Armstrong?

MR. DORKEY: Your Honor, did you deny our motion to dismiss for lack of personal jurisdiction?

THE COURT: That is correct. I overruled it.

(17) MR. FORD: Good afternoon, Your Honor.

THE COURT: Mr. Ford, nice to see you, sir.

MR. FORD: In this case, we have filed a motion for summary judgment on behalf of the defendant named herein as Armstrong Cork.

THE COURT: It is Armstrong World Industries.

MR. FORD: Yes, Your Honor, we have answered the suit in the name of Armstrong World Industries, which is the successor corporation of Armstrong Cork. There is no problem on that score.

THE COURT: All right.

MR. FORD: In the complaint, the plaintiff alleges that Armstrong World Industries, if you will, was negligent and/or that it breached warranties in that it designed, manufactured, produced, tested and labeled certain asbestos products which the decedent was exposed to.

We filed, on behalf of ourselves and all defendants, a general set of interrogatories to the plaintiff, and the answers to those interrogatories failed to reveal any exposure by the decedent to any asbestos containing product manufactured or produced by Armstrong World Industries. Subsequently, we filed a motion for summary judgment on the grounds that there was no such exposure.

The plaintiff, in her opposition to that motion, (18) comes back and says, in effect, "We agree that Armstrong World Industries did not manufacture or produce any such asbestos containing product, but Armstrong Contracting and Supply was a licensee of the product known as limpet, which in turn was manufactured by others, and there was such an exposure to Mr. Catrett to limpet sometime back in the mid sixties."

The opposition to the motion for summary judgment then is that in lieu of Armstrong World Industries, the Court should look to Armstrong Contracting and Supply, which was a subsidiary corporation.

Among the papers filed by the plaintiff in opposition to the motion for summary judgment, is a financial statement put out by Armstrong World Industries, and the plaintiff highlighted the following in its opposition: In 1958 a subsidiary, Armstrong Contracting and Supply Corporation, was formed to handle contract insulation business and allied sales.

The facts before the Court are that in 1958 actually in 1959 this corporation was formed as a wholly-owned subsidiary. It has continued or did continue to function as

such until approximately 1969, when all of the stock was sold to another corporation and it continues to operate to this day. It is a viable, ongoing concern and has been a viable going concern since 1959. We see no reason why the (19) corporate identity of AC&S should be ignored in order to allow the plaintiff to sue.

THE COURT: They could get leave to amend, could they not?

MR. FORD: Absolutely.

THE COURT: Come up here. Stand beside Mr. Ford. I don't see how I can avoid granting Armstrong World Industries' motion for summary judgment, but you probably would have a right to substitute the other successor corporation.

MR. NICHOLL: Would Your Honor be stating that if we filed the motion to amend bringing in AC&S that Your Honor would have no problem with that?

THE COURT: I don't see any off the top of my head.

MR. FORD: I can not speak for AC&S. Patently there is a limitations problem.

MR. NICHOLL: That is patently obvious, Your Honor. Which is one of my major concerns.

THE COURT: You sued the wrong person.

MR. DORKEY: May I be here heard because we put in papers the opposition to Armstrong World Industries' motion.

THE COURT: Are you involved in that?

MR. DORKEY: I object to the fact of dismissing out Armstrong because I think we put in sufficient factual evidence to put in issue the question of the

relationship (20) between Armstrong Cork and Armstrong Contracting and Supply.

Even if we have not put in sufficient evidence from discovery in other cases, we have not had an opportunity, under Rule 56F of the Federal Rules of Civil Procedure, because subject to the Court's jurisdiction we were not able to take discovery on this very issue of the relationship between Armstrong Cork, as it was then known, and Armstrong World, as it is now known, and Armstrong Contracting and Supply.

THE COURT: Why weren't you?

MR. NICHOLL: They just became a party today.

MR. DORKEY: By your ruling today, and I would like to reargue and try to convince Your Honor that we really are not subject to jurisdiction under either the D.C. code or the United States constitution, but until today we were not a party to the action.

THE COURT: You can take discovery even before you—

MR. DORKEY: But, Your Honor, it is inconsistent with our position of jurisdiction, and to take discovery on the merits, Your Honor, is oftentimes considered to be a waiver of a party's jurisdictional objections and we face that other problems in other jurisdictions.

THE COURT: You don't have that problem in the federal courts anymore. That used to be the rule but not today.

(21) MR. DORKEY: I am sure Your Honor is more understanding than other judges, but we have had this problem in other courts.

THE COURT: That is an old rule older than Mr. Ford even.

MR. DORKEY: But we have not had an opportunity to take discovery on that issue in this case and under Rule 56F I think we have made out a case why in addition to the affidavits and the deposition evidence we have put in this case, which clearly raises a factual issue, Your Honor, going to the control of Armstrong Cork over AC&S—

THE COURT: Why should Mr. Ford be penalized because of you?

MR. DORKEY: He is not being penalized because of me. Armstrong Contracting and Supply, when it was a subsidiary of Armstrong Cork, had no legal department, had no accounting department.

THE COURT: We are talking about Armstrong World Industries' motion for summary judgment.

MR. DORKEY: That is right, on the grounds that it is not responsible for Armstrong Contracting and Supply, a subsidiary.

THE COURT: That is right.

MR. DORKEY: There is law in this district and in other jurisdictions that sometimes if a parent exercises (22) overwhelming control, and given other circumstances, it is responsible for the acts or omissions of its subsidiaries.

THE COURT: Do I understand the plaintiff to be contending that the decedent was exposed to the products of a subsidiary of Armstrong World Industries, namely, Armstrong Contracting and Supply Company, Inc.?

MR. NICHOLL: That is correct, Your Honor.

MR. FORD: It was not a product. That is the irony of Mr. Dorkey's position.

THE COURT: They are distributors.

MR. FORD: Of Mr. Dorkey product, and in effect he is arguing to hold AC&S in, or Armstrong in, so he can seek contribution or indemnification against them for his product. And my position is very clear, that if he wants to go after someone he ought to go after his distributor, which was AS&C, and who he licensed. Why come after Armstrong World Industries when there is a viable corporation and his own papers show that they have liability insurance?

THE COURT: Turner Newall also opposes, don't they?

MR. FORD: Yes, sir.

MR. DORKEY: One reason is that — one reason we go after both Armstrong World and Armstrong Contracting Supply is because at the time, the relevant time, they were essentially one entity, Your Honor. It was a division (23) prior to 1959. They made it into a subsidiary. Nothing else changed. It kept the big "A", Armstrong logo during that time period and throughout the time period it operated under the egis, it was all part of one enterprise, same logo, same advertising, everything.

THE COURT: Do you want to say anything else?

MR. DORKEY: I would like to say some things on your denial of the motion for personal jurisdiction.

THE COURT: I am not going to let you reargue that. Do you want to say anything else?

MR. NICHOLL: I would simply state for the record that we adopt the opposition of Turner & Newall to the motion for summary judgment by Armstrong World.

THE COURT: What would be the effect if I grant Mr. Ford's motion? It seems to me the Court is almost compelled to.

MR. NICHOLL: I would think, Your Honor, if I could add something, in January of 1982 we did propound a second set of interrogatories, which would perhaps go to the issue of control of AC&S, or Armstrong Contracting and Supply and Armstrong World.

Mr. Ford did answer those interrogatories, I believe, a couple of weeks ago, but unfortunately when we reached the questions of Armstrong Contracting and Supply and their relationship with Armstrong World they were (24) silent. I would at least request, Your Honor, that we have—

THE COURT: You have had more than ample time. How long has your motion been pending Mr. Ford?

MR. FORD: A number of months.

THE COURT: The motion will be granted, the motion for summary judgment, by Armstrong World Industries.

MR. DORKEY: As long as I am stuck in the case now that you have let everybody else out, even though there are many other people's products who this plaintiff was exposed to—

THE COURT: What else do you have?

MR. DORKEY: I would like to know whether you have any written rulings on these?

THE COURT: No, I do not, counsel. Who has this Huff letter? Did you hand that up to me?

MR. McMURTRIE: I did, Your Honor.

THE COURT: You can present an order, Mr. Ford, or have I already gotten it?

MR. McMURTRIE: I think you have an order from Celotex.

THE COURT: You can work with Mr. Ford.

MR. DORKEY: Excuse me, Your Honor. So what you will do is just simply sign—

THE COURT: I am signing an order based on the (25) authorities in the opposition given.

MR. DORKEY: Could you explain the reasoning why you held us in on jurisdiction?

THE COURT: Sir, no judge has to give you the reason.

MR. DORKEY: I know, I was just asking for some guidance, that is all, Your Honor.

THE COURT: No thank you, sir. The Court has ruled.

(Whereupon, at 2:07 p.m., the hearing in the above-entitled case was recessed.)

* * *

REPORTER'S CERTIFICATE

This record is certified by the undersigned to be the official transcript in the above-entitled case.

MINDI L. COLCHICO
Official Court Reporter

APPENDIX C

ORDER GRANTING SUMMARY JUDGMENT APPEALED

United States District Court for the District of Columbia

Civil Action No. 80-2232

Judge Richey

Filed July 21, 1982

Myrtle Nell Catrett,
Administratrix of the Estate of Louis H. Catrett

Plaintiff,

v.

Johns-Manville Sales Corp., et al.

Defendants.

ORDER

Upon consideration of the Motion by Defendant Celotex Corporation for Summary Judgment, and upon consideration of the entire record herein, it is by the Court this 21st day of July, 1982,

ORDERED that the Motion of Defendant Celotex Corporation for Summary Judgment is granted; and it is further

ORDERED that the Complaint is dismissed as to defendant Celotex Corporation with prejudice.

CHARLES R. RICHEY,
Judge.

Copies to:

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1694 SEPTEMBER TERM 1987
CA NO. 80-2232

Myrtle Nell Catrett, Adminstratrix of the Estate of Louis H. Catrett, deceased

v.

Johns-Manville Sales Corporation, et al.

United States Court of Appeals For The District of Columbia Circuit

Filed Sep 30 1987

George A. Fisher
Clerk

BEFORE: WALD, Chief Judge; BORK and STARR, Circuit Judges

O R D E R

Upon consideration of appellee's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1694 SEPTEMBER TERM 1987
CA NO. 80-2232

Myrtle Nell Catrett, Adminstratrix of the Estate of Louis H. Catrett, deceased

v.

Johns-Manville Sales Corporation, et al.

United States Court of Appeals For The District of Columbia Circuit

Filed Sep 30 1987

George A. Fisher Clerk

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

O R D E R

Appellee's suggestion for rehearing en banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Mikva did not participate in this order.

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.